

JOE B. FALLINI, JR. ET AL.  
v.  
BUREAU OF LAND MANAGEMENT

IBLA 85-79

Decided June 12, 1986

Appeal from a decision of Administrative Law Judge L. K. Luoma setting aside a district manager's decision cancelling a range improvement permit. N6-4-0646.

Reversed and remanded.

1. Grazing and Grazing Lands -- Taylor Grazing Act

Departmental regulation 43 CFR 4120.3-3 provides that a permittee or lessee may apply to BLM for permission to modify a range improvement permit issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315(m) (1982), and, under 43 CFR 4140.1 (b)(2), modification of a range improvement without BLM authorization is a prohibited act. Where, pursuant to a range improvement permit, a livestock operator constructs a stock-watering facility, including steel gates which, when closed, bar access to livestock and wild horses and the operator subsequently installs highway guardrails across the gate openings to discourage or prevent wild horses from gaining access to the watering facilities, while allowing entry to livestock, such installation constitutes a change in the purpose of the improvements originally approved and is a modification of the improvements authorized in the permit. As a result, the operator is required to seek authorization therefor prior to installation.

2. Grazing and Grazing Lands -- Grazing Permits and Licenses: Cancellation or Reduction

Where BLM requires a livestock operator to remove unauthorized modifications of corral gate openings which were installed to discourage or prevent wild horses from gaining access to watering facilities, while allowing entry to livestock, and the operator fails to do so, BLM may cancel the operator's range improvement permit for failure to obtain BLM's permission to modify the authorized improvements. However, where on appeal of

that cancellation the record shows that the livestock operator is a sound range manager and that a serious problem with wild horses exists, the operator will be granted 15 days from receipt of the Board's decision in which to remove the unauthorized modification, failing in which the cancellation will become final.

APPEARANCES: Allan D. Brock, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellant, Bureau of Land Management; W. F. Schroeder, Esq., Vale, Oregon, for respondents.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) appeals from a decision of Administrative Law Judge L. K. Luoma, dated September 27, 1984, setting aside a decision of the District Manager, Battle Mountain District, BLM, cancelling a range improvement permit held by Joe B. Fallini, Jr., Susan Fallini, and Helen Fallini.

The Fallinis conduct a commercial livestock operation in the Reveille Allotment, Battle Mountain District, Nevada. The operation is water based as specified in 43 CFR 4110.2-1(a). On October 25, 1966, BLM issued the subject range improvement permit, designated "Deep Well," N6-4-0646, pursuant to section 4 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315c (1982), to maintain and use a stock-watering facility on public lands in the allotment. The permit described various improvements including "4-Steel Gates" (Exh. 10). On March 16, 1967, BLM inspected the facility and reported that "[t]his improvement has been completed satisfactorily" (Exh. 10). Subsequently, BLM compiled a "Project Completion Report" for the permit indicating that the four steel gates had been installed (Exh. B). <sup>1/</sup> Field inspections by BLM personnel during October and November 1983 revealed that the improvement had been modified without BLM authorization. The modification consisted of the installation of sections of highway guardrail across the gate openings to the stock-watering facility. The guardrails were placed approximately 5 feet above the ground to discourage or prevent wild horses in the Reveille Allotment from gaining access to the stock water.

On December 23, 1983, the District Manager, Battle Mountain District, issued a proposed decision notifying the Fallinis that nine range improvements had been modified without authorization by the installation of guardrails across gate openings. The proposed decision required removal of the guardrails within 15 days of receipt of the decision. On January 12, 1984, the Fallinis filed a protest stating that the guardrails had been removed from all the projects, except Deep Well, N6-4-0646, and setting forth their reasons for not doing so at Deep Well.

---

<sup>1/</sup> There is no evidence that the gates were modified in any way between March 1967 and October 1983, although there is evidence the gates were replaced using similar materials approximately every 5 years (Exh. 26 at 5).

By final decision dated May 3, 1984, the District Manager cancelled the permit for Deep Well because the Fallinis had modified the improvement without first obtaining authorization from BLM. The decision stated that the Fallinis, in failing to obtain BLM's authorization, had violated both 43 CFR 4140.1(b)(2) and the terms of the permit.

The Fallinis appealed pursuant to 43 CFR 4.470 generally contending that installation of the guardrails was not a modification of the range improvement permit, and that BLM failed to perform its responsibilities in the management of wild horses by permitting an excessive number of wild horses to occupy the public land, contrary to the mandate of the Wild Free-Roaming Horses and Burros Act of December 15, 1971, as amended, 43 U.S.C. §§ 1331-1340 (1982). The Fallinis explained that the excess horses had diminished the quality and quantity of forage available to livestock upon the public land and had destroyed the water and watering facilities which they had developed and maintained at enormous personal expense. They requested a hearing, which was held before Administrative Law Judge L. K. Luoma on August 28-30, 1984, in Tonopah, Nevada.

Testifying on behalf of the Fallinis, Robert Smith, an architect, stated that it was his opinion that the guardrails installed by the Fallinis were within the specifications of the range-improvement application and permit. He explained that the permit refers to gates but does not specify how high, low, or wide, they should be (Tr. 38-40). Alvin L. Steninger, a range and ranch management consultant employed by the Fallinis, who was formerly employed by BLM, also believed the guardrails to be within the specifications (Tr. 88).

Steninger participated in the development of a stewardship agreement and amendments between BLM and the Fallinis (Exh. 6, Tr. 57). This agreement specified that the horses would be managed within the 1971 herd area and set a target goal number of 129 horses which could fluctuate upward to 20 percent or 150 horses (Tr. 58-59). The amendment stated the horses would be managed within the interim area of use as recommended through the coordinated resource management program (CRMP) until such time as the definite boundaries of the herd use area were determined. Steninger testified this agreement was still in effect (Tr. 59).

Joe B. Fallini testified about the rest/rotation system of grazing. He explained that because of the excess number of horses using his watering facilities, it was necessary to leave the wells open, thereby "wiping out" the rest/rotation method of grazing (Tr. 137-38). He stated that their section 4 permit was useless because he could not provide enough water for the cattle because the horses consumed so much (Tr. 140).

Fallini referred to a letter dated October 3, 1983, to Secretary James Watt, in which he stated that he would no longer water the wild horses in the Reveille Allotment at his sole expense after October 21, 1983 (Exh. 26). He said that BLM made no effort or offer to water the horses and consequently he installed the guardrails about a month later (Tr. 163-64). Fallini admitted

he did not seek BLM approval before installing the guardrails (Tr. 223). He said there were no wild horses in the Deep Well area on December 15, 1971, the date of enactment of the Wild and Free-Roaming Horses and Burros Act (Tr. 179, 194). Two other witnesses verified this statement (Tr. 237-42, 260-61). Fallini said BLM claimed it removed horses from the area, but it did not (Tr. 524). He stated the ranch could not sustain the increased cost of watering the horses and, if such cost continued, it would render the section 4 permit valueless (Tr. 206).

Leslie Monroe, Area Manager, Tonopah Resource Area, testified on behalf of BLM that on June 30, 1983, he toured the Fallini ranch and discussed extensively with Fallini the problem Fallini was having with the horses drinking water from his wells throughout the allotment. Monroe discussed possible solutions to the problem, *i.e.*, that Deep Well and Pyramid Well (another improvement) should be shut off to allow the forage to rest. Also Monroe stated that he permitted Fallini to close the gates to allow his water storage to build up so Fallini's livestock would have water (Tr. 312). He said Fallini never approached him for permission to modify the range improvement permit (Tr. 314). He explained that he would not likely have granted permission because of the safety hazard the guardrails presented to wild horses (Tr. 314-15). He stated that the guardrails, as installed by Fallini, had the potential to cause injury, but that he would approve a facility that would not cause injury (Tr. 323, 324, 337). He did not know of any incidents of injury to horses because of the guardrails (Tr. 364).

Steven Dondero, BLM range conservationist, testified that horses had difficulty leaving the corral (Tr. 395-400). He saw one horse run straight at a guardrail, skid to a halt in front of it, run off to the side, and then crash into the side of the corral (Tr. 399). Marvin Altom, a veterinarian, also testified to the possibility of injury to the horses and would not recommend the type of barricade in question (Tr. 432-37). Specifically, he noted that the guardrail has a bolt sticking out and a sharp edge (Tr. 437). He explained that when a horse goes under the barricade it is definitely going to scrape its back along the edge and, if pressured, is going to injure itself (Tr. 433-34).

James Fox, District Manager, Battle Mountain District, testified he had a duty to protect wild horses under the Wild and Free-Roaming Horses and Burros Act of 1971, *supra*, and horses did not lose protected status merely by straying outside of the area used in 1971 (Tr. 455, 467-68). As for the stewardship agreement, he viewed this document as a livestock management plan (Tr. 465, 471). Fox explained the agreement encompassed the subject of wild horses as well as it could at that time, but he stated the record of the management framework plan was not complete at the time of the stewardship agreement (Tr. 473). He testified that on August 1, 1984, BLM issued an interim decision updating the earlier management framework plan decision for Tonopah setting the number of wild horses permitted in the Reveille Allotment at 650 (Tr. 466).

Based upon the evidence presented to him, the Judge reached the following conclusions which he announced at the hearing (Tr. 547-48) and later reduced to writing in his decision of September 27, 1984:

One. Appellants have by this proceeding [duly] applied for permission to install guardrails, gates or barriers and that no lawful reason exists why such permission should not be granted and it is hereby granted, provided that the guardrails are modified so that the bottom portions thereof are covered with a rounded surface.

Two. If by October 1, 1985, the Bureau of Land Management has performed the stipulation between the parties as stated immediately above, [2/] the installations herein specifically permitted shall be immediately removed.

Three. The Appellants have not violated the conditions of the Section 4 permit involved in this case nor any applicable federal regulations.

Finally, the decision of the District Manager dated May 3, 1984, is hereby set aside and the application of the Fallinis to install guardrail barriers at the following wells is hereby granted subject only to the conditions stated herein. The named wells or improvements are: Ed's Well, Deep Well, Charlie's Well, Willow Witch Well, Pyramid Well, Last Stand Well, Cedar Pipeline Corrals, Reveille Mill and Pipeline Extension, \* \* \* Joe's Well, Fallini Well, Ray's Well, Lone Tree and Four Troughs.

Decision at 4-5.

The Judge added that this decision confirmed the bench ruling and decision rendered by him on the final day of the hearing, August 30, 1984, following "an in camera conference with both counsel and their respective clients." Decision at 2. 3/

---

2/ This stipulation concerns, in part, BLM's statement that it would issue a decision subject to appeal by the Fallinis concerning the number of wild horses allowed in Reveille Allotment and the area of use. BLM also agreed to remove excess horses from the allotment, the number of which would be determined by mutual count of BLM, the Fallinis, and other persons or organizations prescribed by BLM.

3/ It is obvious Judge Luoma believed the bench ruling and decision had satisfied the parties. In a letter dated Feb. 4, 1985, to counsel for the Fallinis, informing him that his "Motion to Close Case" was being forwarded to the Board, Judge Luoma stated:

"My written decision in this case was issued on September 27, 1984, and the notice of appeal (which under the circumstances appears somewhat perplexing) was filed in my office on October 29, 1984, which I regard as being timely filed." (Emphasis added).

The Board denied that motion in an order dated Feb. 27, 1985.

On appeal BLM asserts the Fallinis violated 43 CFR 4140.1(b)(2) and the terms of the permit by installing sections of highway guardrail without first obtaining BLM's permission. BLM explained that the District Manager, in accordance with 43 CFR 4120.3-1(a), is charged with the responsibility of assuring that range improvements are modified in a manner consistent with multiple-use management. BLM concedes the regulations do not make the range improvement permit subject to cancellation, but asserts that the permit itself provides for cancellation.

BLM contends the Judge's decision to treat the hearing as an application by the Fallinis for permission to modify the range improvement permits is in error. BLM states that an appeal from a decision by BLM cancelling a range improvement permit is not an application to modify an improvement. The Judge, BLM points out, is without authority to grant an application to modify a permit. Also, BLM argues that the Judge's decision is in error because it allows the Fallinis to modify other improvements which were not in issue in this case.

In their answer, the Fallinis contend all the construction was authorized by its permit issued under section 4 of the Taylor Grazing Act, 43 U.S.C. § 315(c) (1982). The Fallinis note that section 4 limits the purpose of construction of improvements to the care and management of permitted livestock, which they interpret to mean domestic livestock.

The Fallinis claim there were no wild horses in the Deep Well area at the time of the passage of the Wild and Free-Roaming Horses and Burros Act of 1971, supra. According to the Fallinis, as the number of wild horses increased in the allotment, the area of used was expanded to Deep Well, an area foreclosed to such use. The Fallinis state that the costs of providing water increased with the additional number of horses and the undiscouraged use by the horses was destroying the grazing capacity of the range.

The Fallinis believe the guardrails were within the scope of the range improvement permit and authorization from BLM was therefore unnecessary. They point out they made other changes or additions to their improvements which were not considered by BLM to be modifications. They assert BLM has no policy concerning what constitutes a modification. Finally, the Fallinis contend BLM waived any objection it might have had about the scope of the decision because it did not enter an objection at the time of the hearing.

In its reply to the answer, BLM insists installation of the guardrails was a modification; the range improvement permit did not authorize placing highway guardrails across the gate openings to the improvement; the guardrails altered or modified the structure so as to discourage, if not prevent, wild horses from gaining access to the stock-watering facilities; and BLM did not waive its right to object to the scope of Judge Luoma's decision by not assigning error when he issued his ruling from the bench.

The Fallinis filed a response to BLM's reply in which they assert that the penalty imposed by BLM's final decision, cancellation of the range improvement permit, is not authorized. The Fallinis assert the only charge

upon which a cancellation can be based is the second sentence of Permit Condition 5 which reads, "Such lands and waters will also be open for other authorized public use to the extent that such use is consistent with the purpose for which the permit is granted." The Fallinis contend that although use by wild horses is authorized on the public lands, it is not authorized in the area of this range improvement. They further assert that regardless of whether wild horses are authorized, use by wild horses is inconsistent with "the purpose for which the permit is granted." They state the only valid reason BLM has to issue a section 4 permit is to fulfill what is "necessary to the care and management of the permitted livestock." 43 U.S.C. § 315c (1982).

The main issues to be considered are:

(1) Whether installation of the guardrails constitutes a modification of the range improvement permit requiring BLM's approval under 43 CFR 4120.3-3 and 43 CFR 4140.1(b)(2).

(2) If the guardrails do constitute a modification, whether failure to obtain BLM's consent for their installation warrants cancellation of appellants' range improvement permit.

A consideration of applicable statutory authority is necessary for the resolution of this case. Implementation of the Taylor Grazing Act of 1934 (the Act), as amended, 43 U.S.C. §§ 315, 315a-315r (1982), is committed to the discretion of the Secretary of the Interior. Clyde L. Dorius v. BLM, 83 IBLA 29 (1984); Ruskin Lines, Jr. v. BLM, 76 IBLA 170 (1983); Chris Claridge v. BLM, 71 IBLA 46 (1983). Section 2 of the Act charges the Secretary with respect to grazing districts on public lands to "make such rules and regulations" and to "do any and all things necessary \* \* \* to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range \* \* \*." 43 U.S.C. § 315a (1982). The Federal Land Policy and Management Act of 1976 (FLPMA), which amended the Taylor Grazing Act, reiterates the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1982). FLPMA also mandates that the Secretary "shall manage the public lands under principles of multiple use \* \* \*." 43 U.S.C. § 1732(a) (1982). Pursuant to the Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1331 (1982), Congress declared that wild, free-roaming horses are to be considered "an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1982).

In keeping with the intent of these statutes, 43 CFR 4120.3-1(a) requires that range improvements be "installed, used, maintained, and/or modified on the public lands, or removed from these lands, in a manner consistent with multiple-use management."

The regulations further provide that a permittee or lessee apply for a permit to modify a range improvement. The applicable regulation, 43 CFR 4120.3-3, reads in pertinent part as follows:

(a) Any permittee or lessee may apply for a range improvement permit to install, use, maintain, and/or modify range improvements that are needed to achieve management objectives within his/her designated allotment. \* \* \* Such range improvement permits are issued at the discretion of the authorized officer.

Also, under 43 CFR 4140.1(b)(2), a permittee or lessee is prohibited from modifying a range improvement without authorization.

[1] We must first consider whether the installation of the guardrails was a modification of the range improvement permit. The Fallinis presented testimony that installation of the guardrails was within the scope of the specifications of the range improvement permit. Whether the guardrails technically may be within the scope of the specifications of the permit is not determinative. Clearly, the guardrails are steel and might be considered as gates, thus, falling within the parameters of the improvements listed in the permit. However, examining the issue from the standpoint of the purpose for the gates results in a finding that the installation of the guardrails was a modification of the permit. The facility was constructed in 1966-67 and the gates, as installed and approved by BLM, were capable of barring access to livestock and wild horses. These gates were "modified" in 1983 to allow access to livestock, while at the same time restricting or prohibiting access by wild horses. There is no evidence that the parties to the permit contemplated or considered such a limitation at the time the permit issued or when the completed facility was inspected by BLM. Since installation of the guardrails constituted a change in purpose, rather than mere maintenance or repair, it was a modification of the improvements listed in the permit, and BLM authorization under 43 CFR 4120.3-3 was required before the Fallinis could install the guardrails. <sup>4/</sup> The record is clear that the Fallinis never contacted BLM for permission to install the guardrails (Tr. 223, 314), and installation without authorization is a prohibited act under 43 CFR 4140.1(b)(2).

The Fallinis point out that they have made numerous other alterations to their improvements and BLM has not required them to apply for permission to modify. The Fallinis assert that BLM has no policy of what constitutes a modification. The record seems to bear out the Fallinis' assertion. There appears to be no stated policy utilized by BLM in determining what constitutes a modification (Tr. 291, 322, 348). Other alterations are not in issue here, however. The failure of BLM to require the Fallinis to apply for permission to modify in previous situations is not authority to disregard the regulation in the face of a clear modification. See Jimmie Ferrara, 47 IBLA 335, 341 (1980); Charles Stewart, 26 IBLA 160, 163 (1976). Furthermore, the District Manager testified that the installation of guardrails in this case required BLM's permission because of the impact of the modification. He explained that the impact in this case was the potential to cause injury to the wild horses

---

<sup>4/</sup> Under this test the addition of guardrail reinforcements to the net-wire corral and periodic replacement of structures with like structures were not modifications. There was no change in the purpose of the corral.

(Tr. 323, 362). 5/ We find that the District Manager was correct in determining approval was required prior to the installation of the guardrails.

Judge Luoma's decision to treat the hearing as an application for authorization to modify the improvement and to grant the application, while apparently done to resolve finally this case at the hearing level, has been challenged by BLM as being without authority. We must agree. An Administrative Law Judge is not authorized to grant an application to modify a range improvement in the first instance. See 43 CFR 4.472. BLM is charged with that responsibility under 43 CFR 4120.3. Granting or denying an application is an initial decision to be made by BLM. 6/ In this case the Fallinis did not file an application nor did BLM take any action on such an application.

The Fallinis argue BLM cannot challenge on appeal the Judge's decision to treat the hearing as an authorization to modify the improvements at Deep Well, because it waived any objection to the scope of the Judge's decision by not assigning error when the Judge issued his decision from the bench. We disagree. There is no duty to assign error at the time of a bench ruling. The regulations regarding appeals contemplate a written decision. See 43 CFR 4.411 and 43 CFR 4.475. Therefore, BLM was not required to assign error to the Judge's decision until it filed its statement of reasons. See 43 CFR 4.412(a).

The Fallinis also contend that use by wild horses is unauthorized and that BLM is bound by the stewardship agreement. Testimony at the hearing establishes that at the time the stewardship agreement was made, the management framework plan for the area in question had not been completed (Tr. 473). Since all studies for that plan had not yet been completed, BLM could not state in the stewardship agreement the final number of horses that would be allowed for that area. 7/ District Manager Fox considered the stewardship agreement to be a livestock management plan (Tr. 471). We find the stewardship agreement was not binding on either BLM or the permittees. It is similar to an allotment management plan in that it is a tool for cooperative management of the grazing lands. In Bert N. Smith v. BLM, 48 IBLA 385, 389-90 (1980), the Board found that an allotment management plan may be consistent with the responsibilities delineated in the Taylor Grazing Act at the time the agreement is developed, but it cannot, however, be viewed as permanently binding. We find that the Board's discussion of the allotment management plan is applicable to the stewardship agreement, and that the number of horses specified in the agreement is not binding on BLM.

---

5/ We note the potential for causing injury was never cited by the District Manager in either his proposed or final decision as a basis for requiring approval prior to installation.

6/ Clearly, however, by decision Judge Luoma could have directed Fallinis to remove the guardrails and file an application for modification of the range improvement permit and directed BLM to process that application in accordance with the findings in his decision.

7/ There is no question, however, that the size of the herd was far in excess of that which BLM, itself, considered to be acceptable (Tr. 79, 178; Exh. 5).

BLM has an obligation to protect wild horses under the Wild-Free Roaming Horses and Burros Act, supra, as well as under FLPMA, supra, which provides for land management "under principles of multiple use." The concept of multiple use was interpreted by the court in American Horse Protection Association, Inc. v. Frizzell, 403 F. Supp. 1206, 1221 (D. Nev. 1975), involving a conflict between the grazing rights of wild horses and cattle, to mean "that neither wild horses nor cattle possess any higher status than the other on the public lands." 8/ The Board has recognized BLM's responsibility to protect wild horses even though their numbers are unauthorized. For example, in Bar X Sheep Co., 56 IBLA 258, 88 I.D. 665 (1981), the Board held that BLM may, in certain circumstances, temporarily suspend portions of maximum allowable active grazing preferences in order to provide forage for excess wild horses.

[2] We shall next consider whether failure to obtain BLM's approval for installation of the guardrails warrants cancellation of the Fallinis' range improvement permit. Although the regulations do not provide for cancellation of the permit for failure to obtain approval for modification, the permit itself arguably does. Section 7 of the permit provides that the permit is subject to cancellation "for noncompliance with the rules and regulations now or hereafter approved by the Secretary of the Interior or where the improvement would interfere with the range management practices determined by BLM or for a violation of any of the terms of this permit." Section 5 provides that public land or impounded waters will be open for wildlife use, hunting, fishing, and other authorized public use to the extent that such use is consistent with the purpose for which the permit is granted.

The regulations do not subject a range improvement permit to cancellation if the permittee modifies the permit without authorization. The regulations do, however, describe the modification of range improvements without authorization as a prohibited act. 43 CFR 4140.1(b)(2). 9/ Since the

---

8/ While American Horse Protection Association, Inc. v. Frizzell, supra, applied the multiple-use provisions of the Act of Sept. 19, 1964, 43 U.S.C. § 1411 (1970), the concept of multiple use was carried over into FLPMA, supra. See 43 U.S.C. § 1701(a)(7) and 1702(c) (1982).

9/ The regulations at 43 CFR 4140.1 provide:

The following acts are prohibited on public lands and other lands administered by the Bureau of Land Management:

\* \* \* \* \*

(b) Persons performing the following prohibited acts may be subject to civil and criminal penalties under §§ 4170.1 and 4170.2:

\* \* \* \* \*

(2) Installing, using, maintaining, modifying, and/or removing range improvements without authorization \* \* \*."

The record does not reflect that any civil or criminal penalties were imposed on the Fallinis for installing the guardrails involved herein.

Fallinis' permit is subject to cancellation "for noncompliance with the rules and regulations now or hereafter approved by the Secretary of the Interior," the permit may be cancelled, according to its terms, for the prohibited act of modifying range improvements without authorization. Cf. Mary A. Van Alen, 8 IBLA 77 (1972) (range improvement permit cancelled pursuant to permit condition).

Testimony of BLM's officials indicates that the Fallinis have a reputation for sound range management. Area Manager Monroe considers the Fallinis' management practices to be satisfactory (Tr. 334). District Manager Fox characterized Fallini as "a good operator." (Tr. 459). He said, "[I]f every one of the range operations in the Battle Mountain district was at least as [good as] Mr. Fallini['s], our district would be a shining example of good range management" (Tr. 458-59). Also, there can be no gainsaying the serious problems which confront the Fallinis. <sup>10/</sup> BLM admits that there are approximately 600 to 800 excess wild horses in the area (Tr. 79, 178). We recognize that this causes difficulties for the Fallinis in increased watering costs and is detrimental to their rest/rotation system of grazing (Tr. 206, 137). Likewise, the effect of cancellation would be the loss of approximately 1500 AUMs by the Fallinis because of the loss of the water base property (Tr. 510), and no water would be available at Deep Well for either cattle or wild horses (Tr. 297).

Under the circumstances, we will allow the Fallinis 15 days from receipt of this decision to remove the guardrails at Deep Well. Failure to do so will result in cancellation of the permit without further notice. Should the Fallinis desire to re-erect the guardrails designed to discourage wild horse access without injury, they should file an application for permit modification with BLM. BLM is directed to act expeditiously on any application filed by the Fallinis and to work with the Fallinis in resolving the problems presented by excess wild horses in the Reveille Allotment.

BLM also objects to the fact that the Judge allowed the Fallinis to modify range improvements other than Deep Well. In appealing the District Manager's final decision of May 3, 1984, the Fallinis referred to their letter of protest dated January 12, 1984, in which they specifically stated that they had complied with BLM's demand to remove the guardrails from their range improvements, except with regard to Deep Well. Appellants stated that they "lodge this protest and appeal concerning it [Deep Well]." (Fallinis' Jan. 12, 1984, letter of protest, at 3). The record also shows that the only gate in issue was Deep Well (Tr. 16). It is well established that an Administrative Law Judge's review is confined to those matters presented on the

---

<sup>10/</sup> On Oct. 3, 1984, the United States District Court for the District of Nevada issued a decision on motions in Joe B. Fallini v. Watt, Civ. LV81-536 RDF. The court granted Fallinis' motion for mandamus compelling defendants to remove wild horses from plaintiff's private lands, and ordered that an injunction would issue enjoining defendants from allowing future trespasses. The district court, however, was reversed in Fallini v. Hodel, No. 85-1585 (9th Cir. Feb. 27, 1986.)

record and addressed in the challenged decision. 43 CFR 4.475(a); see Jones and Sandy Livestock, Inc., 75 IBLA 40, 42-43 (1983). Thus, Judge Luoma exceeded his authority in granting the Fallinis permission to modify improvements other than Deep Well, even though at the hearing BLM apparently acquiesced in broadening the scope of the proceeding (Tr. 544-46, Exh. 29). The Fallinis, however, are not precluded from applying for permit modifications for these other improvements.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded to BLM for action consistent with this decision.

Bruce R. Harris  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

R. W. Mullen  
Administrative Judge

